SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-778

DAVID B. SWOAP, Director, Department of Social Welfare, State of California, individually and in his official capacity,
Petitioner,

v.

CHRISTINA HYPOLITE, a minor by BERTHA HYPOLITE, her guardian et al.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons Why a Writ of Certiorari Should Be Granted	5
1. The Issue Here Presents an Important Question as to the Proper Scope of the Social Security Act's AFDC Program Which Has Not Previously Been Considered by This Court	5
2. The Decision Below Is Erroneous	6
a. California's Regulation EAS § 41-450.12 Is Consistent With Federal Requirements	6
b. The Challenged Regulation Poses No Equal Protection Problems	12
Conclusion	14

Appendices

TABLE OF AUTHORITIES CITED

Cases	Pages
Carleson v. Remillard, 406 U.S. 598 (1972)	7, 8
Dandridge v. Williams, 397 U.S. 471 (1970)	6, 11, 12
Jefferson v. Hackney, 406 U.S. 535 (1972)	7, 12, 13
King v. Smith, 392 U.S. 309 (1968)	6, 7, 11, 13
Lewis v. Martin, 397 U.S. 552 (1969)	5
New York State Department of Social Services v. Dublino, 41 United States Law Week 5047 (June 21, 1973)	7
Pearson v. State Social Welfare Board, 54 Cal.2d 184 (1960)	7
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968)	5
Townsend v. Swank, 404 U.S. 282 (1971)	7
Trull v. District of Columbia Department of Public Welfare, 268 A.2d 859 (1970)	13
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	13
Zemel v. Rusk, 381 U.S. 1 (1965)	5

STATUTES Pages

United States Code:
28 U.S.C. 1257(3) 2
42 U.S.C. 601 6
42 U.S.C. 602(a)(10) 6
42 U.S.C. 606(a) 2, 5, 6, 8

California Welfare and Institutions Code:
§ 10553(b) and (d) 3, 7
§ 11250 ..... 3, 7

Federal Regulations 45 CFR 233.90(c)(1)(iii) 233.90 (c)(1)(iii) 3, 10

Handbook of Public Assistance Administration Part IV (Dept. of Health, Education & Welfare)..... 8, 9

Eligibility and Assistance Standards, EAS § 41-450.12 ..... 3, 4, 6, 8, 11

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CHRISTINA HYPOLITE, a minor by BERTHA HYPOLITE, her guardian et al.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

DAVID B. SWOAP, Director, Department of Social Welfare, State of California, individually and in his official capacity as successor to Robert B. Carleson, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of California entered in the above case on June 18, 1973, petition for hearing to the Supreme Court denied August 16, 1973.

OPINION BELOW

The opinion of the Court of Appeal of the State of California is reported in 32 Cal.App.3d 979, 108 Cal Rptr. 751 (1973) and is appended to this petition as Appendix "A". Hearing by the California Supreme Court was denied without opinion.

JURISDICTION

The Court of Appeal of the State of California rendered its opinion in this case on June 18, 1973. A timely Petition for Hearing, filed on July 30, 1973, was denied by the Supreme Court on August 16, 1973 without opinion.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(3) since the validity of a state regulation has been drawn into question on grounds of repugnancy to the Equal Protection Clause of the United States Constitution and as being in conflict with section 406(a) of the Social Security Act. (42 U.S.C. § 606(a)).

QUESTIONS PRESENTED

1. Is a state regulation which has been accorded the longstanding and continuing approval of the Department of Health, Education and Welfare and which finds "Continued Absence" of a parent from the home not to exist as a basis of eligibility for Aid to Families with Dependent Children when both parents are jointly maintaining their home while their child lives elsewhere invalid under the Supremacy Clause of the United States Constitution as being inconsistent with the definition of "Continued Absence" set forth in the Social Security Act?

2. Is a state regulation which finds "Continued Absence" to exist as a basis for eligibility of a dependent child for welfare assistance when the natural parent is physically

absent from the home and the nature of the absence connotes a substantial severance of familial ties, but which fails to find such "Continued Absence" when both natural parents continue their joint maintenance of their home while their dependent child lives elsewhere, so purely arbitrary and devoid of rational basis as to violate the Equal Protection Clause of the United States Constitution.

STATUTES INVOLVED[1]

The State regulation which is the subject of this case is California Department of Social Welfare Eligibility and Assistance Standards (EAS) section 41-450.12. The regulation provides, in pertinent part, as follows:

> .1 *Definition of 'Continued Absence'*
>
> " 'Continued Absence' exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation; that is, a substantial severance of marital and family ties which deprives the child of at least one of its natural parents.
>
> "A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities compared to previously existing conditions.
>
> " 'Continued Absence' does not exist: . . .
>
> ".12 When both parents are maintaining a home together but the child lives elsewhere. It is imaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency on behalf of the parents, or by another authoritative agency."

---

1. The full text of section 406(a) of the Social Security Act (42 U.S.C. § 606(a)), 45 Code of Federal Regulations Section 233.90 (c)(1)(iii), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and California Welfare and Institutions Code sections 10553 and 11250, all of which are herein involved, are printed in full in Appendix "B".

STATEMENT OF THE CASE

CHRISTINA HYPOLITE, MICHAEL JENSEN and the class they represent are minor children for whom application for Aid to Families with Dependent Children (AFDC) has been made, but whose eligibility therefor has not been established. In each case, the minor child's natural parents have continued to jointly maintain their home and the family structure has not itself suffered any substantial dissociation, but the minor child is no longer residing with the natural parents in their home. Under these circumstances, "continued absence" of the parent from the home is found not to exist and AFDC assistance is denied pursuant to the subject California regulation.

At the time of her institution of this action, CHRISTINA HYPOLITE resided with her paternal grandmother in Alameda County. Her natural parents resided together in Louisiana with Christina's brothers and sisters. Christina had been receiving AFDC from Alameda County on the basis of her father's unemployment. Assistance was discontinued when he again became employed.

MICHAEL JENSEN has been residing with his maternal grandfather since he voluntarily left the home of his parents. His parents have continued to reside together and jointly maintain their home. Application for AFDC was made on his behalf by his grandfather, but was denied on the authority of regulation EAS § 41-450.12.

Respondents' complaint for declaratory and injunctive relief and petition for writ of mandate was dismissed by the trial court after hearing on motions for summary judgment. On appeal, the Court of Appeal reversed the judgment and the Supreme Court denied petitioner's timely request for hearing.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The Issue Here Presents an Important Question as to the Proper Scope of the Social Security Act's AFDC Program Which Has Not Previously Been Considered by This Court.

The decision of the Court of Appeal held invalid a regulation of the State Department of Social Welfare which has been a part of the California "State Plan" almost since the inception of this State's participation in the federal government's Aid to Families with Dependent Children (AFDC) program. In holding the regulation violative of constitutional equal protection and out of conformity with federal law and regulations, the decision of the Court of Appeal found "continued absence" of a parent to exist as a basis of deprivation for AFDC eligibility when both natural parents continued to reside together with no severance of either marital or family ties. Such a judicial construction of section 406(a) of the Social Security Act (42 U.S.C. § 606(a)) is clearly contrary to that of the Department of Health, Education and Welfare and thus fails to observe the venerable principle that the construction of a statute by those charged with its execution should be followed in the absence of compelling evidence that it is wrong.[2]

If the decision of the Court of Appeal is allowed to stand, deprivation of a child will be found to exist as a basis for eligibility for assistance even though that child's parents reside harmoniously together. Such a result would permit parents by choice and at any time to defeat the expectation of the Social Security Act that support for the child inheres in the structure of families in which there has been no

2. *Lewis v. Martin*, 397 U.S. 552, 559 (1969); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1968); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

severance of normal parental relationships. Such a result would vastly increase the proper scope of the AFDC program.

2. The Decision Below Is Erroneous.

a. California's Regulation EAS § 41-450.12 Is Consistent With Federal Requirements.

The Social Security Act provides for a grant of AFDC assistance to a "dependent child", who is defined in section 406(a) of the Act (42 U.S.C. § 606(a)) as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent and who is living with" any of certain specified relatives. Section 401 of the Act (42 U.S.C. § 601) requires participating states to submit a "State Plan" to the Secretary of the Department of Health, Education and Welfare for approval, which plan must provide, pursuant to section 402(a)(10) of the Act (42 U.S.C. § 602(a)(10)), "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals". The AFDC program is thus a joint federal-state venture by which assistance is provided needy dependent children through their family structure.

With the caveat that a State Plan which conforms to the broad guidelines of federal law must be prepared and presented for approval to the Secretary of the Department of Health, Education and Welfare, the states are afforded considerable latitude in the allocation of scarce resources, the determination of need and benefit levels, and the administration of their programs. *King v. Smith*, 392 U.S. 309 (1968); *Dandridge v. Williams*, 397 U.S. 471 (1970). This broad Congressional grant of discretion to the states does not, of course, permit the exclusion of persons from AFDC

benefits whom the Social Security Act expressly provides would be eligible. *Townsend v. Swank,* 404 U.S. 282 (1971); *Carleson v. Remillard,* 406 U.S. 598 (1972); *King v. Smith, supra.* Nonetheless, the propriety of a statutory or regulatory course of action is a matter entirely within the competence of the state, insofar as state action is not in violation of any *specific* provision of the Social Security Act or the Constitution. *Jefferson v. Hackney,* 406 U.S. 535, 541 (1972); *New York State Department of Social Services v. Dublino,* 41 United States Law Week 5047 (June 21, 1973).

The regulation at issue in this case was promulgated and made an integral part of the California State Plan pursuant to the statutory authority given the Director of Social Welfare to formulate regulations and general policies which are consistent with law and necessary for the administration of aid. (Welfare and Institutions Code, §§ 10553(b) and (d)). Furthermore, although it has undergone changes in numbering and wording, it has been given effect since approximately 1947.

Pursuant to the regulation, "continued absence from home" as a basis for deprivation is found not to exist when the parents of a child are together maintaining their home, but the child lives elsewhere.

The regulation was promulgated to provide administrative guidelines to the implementation of Welfare and Institutions Code § 11250, the basic statute by which eligibility for participation in the AFDC program is determined. In view of California's public policy to establish and maintain conformity with the Social Security Act,[3] it is hardly surprising that the provisions of said statute are, to a marked degree, coterminous with federal requirements for state

3. *Pearson v. State Social Welfare Board,* 54 Cal.2d 184 (1960).

entitlement to federal funding for assistance programs. Under these circumstances, the consistency of the subject regulation with the California statute is necessarily determined by its conformity with the intent of federal law.

The inquiry as to whether or not EAS § 41-450.12 conflicts with the Social Security Act is essentially two-fold: First, is a child living apart from parents who cohabit and who are openly maintaining their home a "dependent child" such that the regulation must fall as incompatible with the definition thereof contained in the Act? Second, does the California regulation impose an eligibility requirement in addition to those imposed by federal law and is it therefore invalid?

The reference point of the AFDC program and of the definition of a "dependent child" (42 U.S.C. § 606(a)) in determining whether or not a child is "deprived" and therefore eligible for assistance is that child's family. Such deprivation is found only in instances wherein the family structure itself has suffered some substantial dissociation such as that caused by the death, continued absence, or incapacity of a parent. Effective deprivation of a child by means of parental neglect without some accompanying family dissociation, does not give rise to AFDC eligibility.

The key concept relevant herein to the validity of the regulation is that of "continued absence from the home."

Although "continued absence" has no Congressional definition, such term has been defined by the Department of Health, Education and Welfare in Part IV of its "Handbook of Public Assistance Administration" which, in section 3422.2 thereof, provides as follows:

"3422. *Continued Absence of the Parent from the Home*

"3422.2 *Interpretation*—Continued absence of the parent from the home constitutes the reason for

> deprivation of parental support or care under the following circumstances:
>
> 1. When the parent is out of the home;
>
> 2. When the nature of the absence is such as either to interrupt or terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
>
> 3. When the unknown or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return. Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as a divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical, or psychiatric care, search for employment, employment away home, service in the armed forces or other military service, and imprisonment."

From the materials cited above, it is evident that the likelihood that either Congress or HEW specifically contemplated the situation envisioned by the regulation is remote. In fact, it appears that the precise question presented herein is one of first impression. The examples given, however, seem consistent with the basic Congres-

sional reference to family structure and the expectation that deprivation is non-existent when parents are together maintaining a home as support should then derive from them. Thus, "continued absence," as treated in the "Handbook," suggests a family situation akin to death or incapacity of a parent in which "dependency" of the child arises only upon the serious and substantial destruction of the *expectation* of economic protection being available to a child from his parent. No such situation exists, with the family in which the parents continue to maintain their family ties and the only change is the absence of the child from the home.

Longstanding HEW approval of this regulation in California's State Plan provides further indication that it properly reflects Congressional concern with providing assistance only to dependent children whose deprivation derives from the substantial severance of family and marital ties. HEW's policy of approval was most recently affirmed on May 25, 1973 in a letter from the office of the Regional Commissioner. A copy of said letter was presented to the Court of Appeal and is attached hereto as Appendix "C". In addition, recently proposed regulations of HEW published in response to the decision of this Court in *Carleson v. Remillard*, 406 U.S. 598 (1972) and designed to eliminate possible confusion over the concept of "continued absence from the home" make explicit this requirement of family dissociation. 45 CFR 233.90(c)(1)(iii) (F.R. Doc. 73-18540; filed 8/31/73)

Without this requirement of a severance of familial or marital ties, the mere relinquishment of parental responsibility would suffice for eligibility for AFDC. AFDC was not intended to subsume parental responsibility.

The foregoing discussion demonstrates the conformity of California's regulation with the definition of "continued

absence from home." The subject of succeeding discussion is the implicit holding of the Court of Appeal that EAS § 41-450.12 adds an eligibility factor in addition to those created by the federal Act. In this regard, it seems clear that children in families with whom the regulation is concerned were never intended for inclusion within the AFDC program. As a consequence, no additional eligibility factor is added thereby.

The AFDC program derived from the Great Depression to meet the specific needs of children deprived of a "breadwinner", "wage earner" or "father" such that the expectation of economic security inuring to a child from his parent was destroyed by some substantial dissociation of the family wrought by involuntary social and economic factors. Neither mere need of the child nor actual lack of support from the parent or parents is enough to establish eligibility, for the mere presence of the parents gives rise to the expectation of support which precludes assistance. "Work relief" programs and the revival of private industry were expected to cope with the problems relating to need. *King v. Smith, supra* at 327-328. The many provisions throughout the Act relative to support enforcement seek to bolster concretely the Congressional expectation thereof discussed above.

In actuality, the California regulation closely proximates the expectations of the Federal Act and is fully consistent therewith. When parents together maintain a home, the whereabouts of which is known, the reasonable expectation is that there has been no substantial dissociation of the family as parents are expected to provide support when living together, have a legal duty to provide support, and have available their home for the child. Furthermore, the most fundamental purpose of the AFDC program has been to provide relief through the family structure. It was for

this purpose that Congress authorized aid to children whose need arose merely from their parent's unemployment, although such parent need not even be incapacitated. *Dandridge v. Williams,* 397 U.S. 471, 429 (1970). The instant regulation is certainly consistent with such Congressional purpose in regarding the family structure as the source of income and care for the child.

There is nothing in the California regulation inconsistent with the federal Act or regulations. The granting of AFDC eligibility to children whose parents cohabit and whose whereabouts are known as requested by respondents would be inconsistent therewith, however. Such an eligibility grant would permit parents by choice and at any time to defeat Congressional expectations as to family support which inhere in the Act. Parents might thus, while maintaining their family home, voluntarily send the child away in order to establish AFDC eligibility. Since, however, Congress presumed both that home and parental support to be available to the child, the invalidation of the regulation would defeat the very purpose of AFDC and expand its scope far beyond the legislative design to meet the needs of "one clearly distinguishable group" of children whose family situation has involuntarily suffered substantial dissociation.

b. The Challenged Regulation Poses No Equal Protection Problems.

The test to be applied in welfare cases to determine whether or not a state classification is in violation of the Equal Protection Clause as discussed in *Jefferson v. Hackney,* 406 U.S. 535 (1972), is that of rational basis. Thus, this Court cited *Dandridge v. Williams,* 397 U.S. 471 (1970) at 485, as emphasizing that,

> ". . . 'in the area of economics and social welfare, a State does not violate the Equal Protection Clause

> merely because the classifications made by its laws are imperfect.' A Legislature may 'select one phase of one field and apply a remedy there neglecting the others.' *Williamson v. Lee Optical Company,* 348 U.S. 483, 488 (1955). So long as its judgments are rational, and not invidious, the Legislature's efforts to tackle the problems of the poor and needy are not subject to a constitutional straitjacket . . ." *Jefferson v. Hackney, supra,* at 546.

The effect of the California regulation is to distinguish between children living apart from parents who are maintaining a common home the whereabouts of which is known, and children who have simply been deserted by their parents. In the former case, there is ineligibility; in the latter case, there is eligibility. The reason for this distinction is inherent in the purposes of the AFDC program itself. That is, AFDC is not designed to aid all needy children, but only those belonging to one clearly distinguishable group. This group is composed of children in families without a "breadwinner" or parent. *King v. Smith,* 392 U.S. 309, 328 (1968). Thus, it was the reasonable expectation of Congress that parents who were employed would support their children. *Id.* Indeed, this expectation pervades the entire AFDC program such that actual support rendered to children is often irrelevant. As this Court observed in *King v. Smith, supra,* at 329, an employable natural father residing at home with his family might well fail to render support or indeed adamantly refuse in any way to care for his children. Those children, although surely deprived of parental support or care, are nonetheless ineligible for AFDC (See *Trull v. District of Columbia Department of Public Walfare,* 268 A.2d 859 (1970).

The effect of the instant California regulation is to restrict eligibility to the same class of dependent children that has been the subject of Congressional concern. California recognizes, as did Congress, that families in which there has been a substantial severance of family and marital ties such that the "breadwinner" is absent from the home are often left without recourse other than that provided by public assistance. On the other hand, there is reasonable basis to exclude from AFDC eligibility those children in families yet maintaining a home inasmuch as the viability of the family home provides grounds for the expectation that support will be rendered the children by their parents. AFDC was not intended to subsume parental responsibilities.

CONCLUSION

For the reasons discussed above, we respectfully submit that certiorari should issue to review the decision of the Court below.

DATED: November 13, 1973, San Francisco, California.

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Appendix A

In the Court of Appeal of the State of California

First Appellate District

DIVISION ONE

1 Civil 32095

(Sup. Ct. No. 424055)

Filed, June 18, 1973
Court of Appeal, First App. Dist.

Clifford C. Porter, Clerk

By ..... Deputy

CHRISTINA HYPOLITE, a minor, by BERTHA HYPOLITE, her guardian; MICHAEL HALLICK JENSEN, a minor, by ROLLAN ELLER, his guardian; CALIFORNIA WELFARE rated association by CATHERINE JERMANY, President, on behalf of themselves and all others similarly situated,

Plaintiffs and Appellants,

vs.

ROBERT B. CARLESON, DIRECTOR, Department of Social Welfare, State of California, individually and in his official capacity,

Defendant and Respondent.

This is an appeal by plaintiffs from a judgment denying relief on their complaint for declaratory and injunctive relief and their petition for writ of mandate.

Plaintiffs sought to challenge the exclusion by defendants of certain children from participating in the aid to families with dependent children program (hereinafter "AFDC") provided for in 42 U.S.C. sections 601-610, and Welfare and Institutions Code sections 11200-11488.[1]

Plaintiff Christina Hypolite (hereinafter "Christina") is a minor child, 11 years of age, residing with her paternal grandmother and legal guardian Bertha Hypolite, in the County of Alameda. Payments to Bertha Hypolite for the benefit of Christina were discontinued on the authority of Regulation 41-450.12 of the State Department of Social Welfare and Eligibility and Assistance Standards (hereinafter "the Regulation").

Plaintiff Michael Hallick Jensen (hereinafter "Michael") is a minor child, 16 years old, residing with his maternal grandfather and legal guardian Rollan Eller, in the County of Stanislaus. Eller's application for AFDC on behalf of Michael has been denied pursuant to the Regulation.

Christina was deserted by her parents at birth and was left with her grandmother. Christina's parents at the present time reside together in New Iberia, Louisiana, with their four other children and never have been, nor by a finding of defendant Carleson, are they now able to financially support Christina. Her grandmother is unable to provide for her.

Christina received AFDC relief through January 21, 1971, on the basis that her father in Louisiana was then unemployed. However, on January 7, 1971, this aid was discontinued effective January 31, 1971, on the basis that the

1. Unless otherwise indicated, all statutory references hereinafter made are to the Welfare and Institutions Code.

father was now employed. On January 25, 1971, a request for a hearing pursuant to section 10950 was submitted. On March 1, 1971, a hearing was held and on September 28, 1971, the referee denied aid.

Michael has resided with Eller since October 25, 1971, on which date he had gone voluntarily to the home of his grandfather complaining of parental neglect. His parents were contacted and indicated their refusal to accept the child back into their home. This refusal continues to the present time. Eller is now the legal guardian of Michael pursuant to the letters of guardianship issued January 18, 1972. Michael's parents reside together in Auburn, California, and have made no financial contribution to Michael's support since October 25, 1971. Eller is financially unable to provide for the child. On November 12, 1971, Eller, on behalf of Michael, made application for AFDC. On November 26, 1971, he was informed that his application had been denied on the basis of the Regulation.

Petitioners are seeking relief from the application of the Regulation on behalf of themselves individually and on behalf of all other children similarly situated. The issue presented is whether the Regulation is valid and effective.

The Regulation was adopted by defendant Carleson, as Director of the Department of Social Welfare of the State of California, pursuant to his authority to formulate regulations in aid of administering AFDC. (§ 10553, subds. (b) and (d).) Specifically, the Regulation was enacted in implementation of section 11250, which in pertinent part provides: "Aid, services, or both, shall be granted under the provisions of this chapter, and subject to the regulations of the department, to families with related children under the age of 18 years, except as provided in Section 11253, in need thereof because they have been deprived of parental sup-

port or care due to: . . . (b) The divorce, separation or desertion of a parent or parents and resultant *continued absence* of a parent from the home for these or other reasons; . . ." (Emphasis added.)[2]

The Regulation deals with a definition of the term "continued absence" as used in section 11250. In pertinent part the Regulation provides as follows:

"*AFDC*

.1 *Definition of 'Continued Absence'*

"'Continued Absence' exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation; that is, a substantial severance of marital and family ties which deprives the child of at least one of its natural parents.

"A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities compared to previously existing conditions.

"'Continued absence' does not exist: . . .

".12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency on behalf of the parents, or by another authoritative agency.

".2 *Circumstances That Meet the Definition of 'Continued Absence'* . . .

".26 Both parents are physically out of the home and their whereabouts are not known. . . ."

Plaintiffs contend that section 11250 clearly provides for aid to be given to a child whose parent or parents have deserted him without regard to whether or not the deserting

2. Section 11250 has been amended effective July 1, 1973, by the deletion of the words "services, or both," after "Aid" in the first paragraph.

parents reside together. Defendants, in turn, urge that the Regulation correctly limits "continued absence" to situations where the family structure has suffered severe dissociation and that such a dissociation does not exist when the child's parents are in fact maintaining a home.

In determining the proper interpretation of section 11250 we first observe that administrative regulations must conform to the legislative will and that if such regulations violate acts of the Legislature they are void. (California Welfare Rights Organization v. Carleson, 4 Cal.3d 445, 455; Morris v. Williams, 67 Cal.2d 733, 737.) Accordingly, in ascertaining the intent articulated in section 11250, we should first turn to the words of the statute to determine the will of the Legislature and to give effect to the statute according to the usual, ordinary import of the language employed in framing it. (Noroian v. Department of Administration, 11 Cal.App.3d 651, 654-655; Kimball v. County of Santa Clara, 24 Cal.App.3d 780, 784.)

We advert to the pertinent provisions of section 11250. These provisions provide that aid is to be granted to children who have been deprived of parental support or care due to the divorce, separation or a desertion of a parent or parents where such divorce, separation or desertion results in the "continued absence of the parent from the home for these or other reasons; . . ." The reference point of the statute is the deprived child. Accordingly, the statute is most fairly construed in terms of *absence from the child's home*. A child is just as effectively deprived of parental support and care when he has been abandoned and excluded from a home which his parents are maintaining together as when he remains in a home with one natural parent where the other natural parent is physically absent from the home by reason of a substantial severance of the marital and family ties.

We observe that section 606(a) of title 42 United States Code, in pertinent part, defines the term "dependent child" as "a needy child (1) who has been deprived of parental support or care by reason of the . . . continued absence from the home . . . and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother . . . in a place of residence maintained by one or more of such relatives as his or their own home, . . . " This statute clearly indicates that the term "home" has reference to the home in which the dependent child is living.

It is well settled that eligibility under the AFDC program must be measured by federal standards. (Carleson v. Remillard, 406 U.S. 598, 600 [92 S.Ct. 1932, 1934]; Townsend v. Swank, 404 U.S. 282, 286; King v. Smith, 392 U.S. 309, 333-334.) In *Remillard* it was specifically pointed out that under the AFDC program Congress intended to provide programs for the economic security and protection of all children and that it did not arbitrarily intend to leave one class of destitute children entirely without meaningful protection. (Carleson v. Remillard, supra, 406 U.S. at p. 602 [92 S.Ct. at p. 1936]; see King v. Smith, supra, at p. 330.)

Considerable stress is placed by defendants on the administrative interpretation of the meaning of section 11250 and section 606(a) of title 42 United States Code, and they urge upon us the rule of interpretation that continuous, consistent application of an administrative interpretation is of great persuasive force in helping a court to determine legislative intent. (See City of Los Angeles v. Rancho Homes, Inc., 40 Cal.2d 764, 770-771; Pearson v. State Social Welfare Board, 54 Cal.2d 184, 210.) In this connection we here note that the Regulation has been applied continuously over the past few years without comment or change of the statute by the Legislature. The rule urged upon us by defendants must, however, yield to the paramount rule that

administrative regulations that violate acts of the Legislature are void. (California Welfare Rights Organization v. Carleson, supra, 4 Cal.3d 445, 455; Morris v. Williams, supra, 67 Cal.2d 733, 737.)

Defendants have submitted for our consideration a letter dated May 25, 1973, from the Regional Commissioner of the Department of Health, Education and Welfare (hereinafter "HEW") stating that in the opinion of HEW "exclusion of children whose parents live together but who themselves live elsewhere is not inconsistent with Federal standard governing continued absence" and that HEW sees no reason "to change HEW's long standing policy of approval of EAS 41-450.12."[3] It should be here noted that on July 21, 1972, the same regional commissioner, in a letter to counsel for plaintiffs stated as follows: ". . . Your question related to eligibility of a child, living with relatives, but whose parents—living together elsewhere, could care for him. There is no question that under Title IV-A Section 406(a) of the Social Security Act, such a child could be considered deprived of parental support or care. *This section speaks of the home of the child and not to the home of the parents.* Therefore Federal matching would be available for otherwise eligible children, living with a specified relative, although the parents are maintaining a home elsewhere and the child could live with them. [¶] Over the years, states have been permitted to adopt policies that denied assistance to such children, . . . As with several other policies and practices, this one is under review in light of the recent U.S. Supreme Court decisions." (Emphasis added.)[4]

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3. This letter, received in augmentation of the record, is from Philip Schafer, as Regional Commissioner, to David Swoap, Director, State of California Department of Social Welfare.

4. This letter was an exhibit in the court below.

The change in the regional commissioner's interpretation is said in the most recent letter to be the result of a re-examination of the Regulation in light of *Townsend v. Swank*, supra, 404 U.S. 282, and other judicial decisions concerning the validity of state eligibility requirements. We see nothing in *Townsend* or in *Remillard*, which cites *Townsend*, supportive of a necessity for the commissioner to change his opinion. *Townsend* held invalid an Illinois statute and regulation which provided that needy dependent children 18 through 20 years attending a college or university did not qualify under the AFDC program as being in conflict with the federal statutory provision and violative of the supremacy clause. *Remillard* held that a California regulation excluding so-called military orphans from benefits under the AFDC program was unauthorized and invalid under the supremacy clause. In *Remillard* the regulation provided that military service did not constitute "continued absence from the home."

The ambivalence in the commissioner's two opinions indicates to us that we can place little reliance on the administrative interpretation insofar as the subject Regulation is concerned. Rather, we are impelled to conclude with the observation in *King* that "It is . . . clear that to the extent HEW has approved any . . . provision which conflicts with § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), such approval is inconsistent with the controlling federal statute." (392 U.S. at p. 333, fn. 34.)

We conclude, moreover, that the Regulation, insofar as it draws distinctions of eligibility based solely upon whether or not the parents who have abandoned children reside together, creates a classification which violates the equal protection clause of the Fourteenth Amendment. As observed in *Purdy & Fitzpatrick v. State of California*, 71 Cal.2d 566,

578, "The concept of equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (See Gray v. Whitmore, 17 Cal.App 3d 1, 21; Williams v. Field, 416 F.2d 483, 486; and see Jefferson v. Hackney, 406 U.S. 535, 545-546; Dandridge v. Williams, 397 U.S. 471, 484.) Although this concept does not require absolute equality (Douglas v. California, 372 U.S. 353, 357; In re Antazo, 3 Cal.3d 100, 110), or that a statute necessarily apply equally to all persons (Rinaldi v. Yeager, 384 U.S. 305, 309; In re Antazo, supra), a state may not provide for differences that amount to invidious discrimination. (Douglas v. California, supra, at p. 356; In re Antazo, supra; Gray v. Whitmore, supra, at pp. 21-22.)

This clause "forbids the establishment of laws which arbitrarily and unreasonably create dissimilar classifications of individuals when, looking to the purpose of those laws, such individuals are similarly situated." (Williams v. Field, supra, 416 F.2d 483, 486; see Asbury Hospital v. Cass County, 326 U.S. 207, 214; Vincent v. State of California, 22 Cal.App.3d 566, 572; see Jefferson v. Hackney, supra, 406 U.S. 535, 544-545 [92 S.Ct. 1724, 1731]; Dandridge v. Williams, supra, 397 U.S. 471, 483.)

The subject federal enactments and California legislation are designed to provide assistance to children who are without parental structure "away from home." The reference point in the legislation is the deprived child and the home referred to is the child's home. The Regulation, in limiting the purpose of the federal and state legislation, has arbitrarily and unreasonably created a dissimilar classification of children who are similarly situated with other children to whom aid has been extended. The children in the present case share with the eligible class the necessary

relevant characteristics, i.e., deprivation of parental support and care by reason of the absence of the parents. In sum, the Regulation, in the respects here involved, provides for differences that amount to invidious discrimination.

In *Townsend*, the Supreme Court, having found the Illinois statute and regulation invalid under the supremacy clause, did not reach the equal protection issue. (404 U.S. at p. 291.) The court noted, however, that the statute and regulation there involved discriminated between the needy children before the court solely upon the basis of the type of school they attended. (404 U.S. at p. 287.)

Accordingly, we hold the Regulation to be void and unconstitutional insofar as it provides that "continued absence" does not exist, within the meaning of section 11250, when both parents are maintaining a home together but the child lives elsewhere.

The judgment is reversed with directions to the trial court to grant the peremptory writ of mandate.

Certified for Publication

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MOLINARI, P.J.

We Concur:

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SIMS, J.

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ELKINGTON, J.

Hearing denied, California Supreme Court, August 16, 1973

Appendix B

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C.

§ 606(a): The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

Welfare & Institutions Code

§ 10553:

The Director shall:

(a) Be responsible for the management of the Department.

(b) Administer the laws pertaining to the administration of aid.

(c) Observe and report to the Governor on the conditions of aid throughout the state.

(d) Formulate, adopt, amend or repeal regulations and general policies affecting the purposes, responsibilities and jurisdiction of the department and which are consistent with law and necessary for the administration of aid.

All regulations heretofore adopted shall remain in effect and shall be fully enforceable unless and until readopted, amended or repealed by the director.

(e) Perform such other duties as may be prescribed by law and such other administrative and executive duties as have by other provisions of law been previously imposed.

Welfare and Institutions Code

§ 11250: Aid, services, or both shall be granted under the provisions of this chapter, and subject to the regulations of the department, to families with related children under the age of 18 years . . . in need thereof because they have been deprived of parental support or care due to: . . .

(b) The divorce, separation, or desertion of a parent or parents and resultant continued absence of a parent from the home for these or other reasons;*

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*Section 11250 has been amended effective July 1, 1973 by the deletion of the words "services, or both", after "Aid" in the first paragraph.

§ 233.90 FACTORS SPECIFIC TO AFDC

• • • •

(c) Federal Financial participation.

• • • •

(1) • • •

(iii) Continued absence of the parent from the home. —(A) Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when (1) the parent is physically absent from the home; (2) the nature of the absence constitutes family *dissociation*; and (3) the absence has continued for 30 days, or facts exist that give rise to a presumption that the absence will continue for longer than 30 days.

(B) "Family dissociation" (1) means a substantial severance of marital and family ties and responsibilities resulting in the child losing or having a substantial reduction of physical care, communication, guidance and support by at least one of his parents, i.e., in relation to his natural parents, adoptive parents, or stepparent as defined in paragraph (a) of this section, as may be appropriate, and (2) includes separation due to hospitalization, deportation, or incarceration.

(c) An otherwise eligible child may not be denied AFDC solely because his parent is in the military service.

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[FR Doc. 73-18540, Filed 8-31-73; 8:45 a.m.]

Appendix C

Department of Health, Education, and Welfare
Social and Rehabilitation Service
Washington, D.C. 20201 [Letterhead]
May 25, 1973

Mr. David B. Swoap, Director
Department of Social Welfare
State of California
744 P Street
Sacramento, California 95814

Dear Mr. Swoap:

California's definition of continued absence provides that continued absence does not exist when both parents are maintaining a home together but the child lives elsewhere (EAS 41-450.12). I understand that this State regulation has been part of the California State plan approved by HEW since approximately 1947.

On July 21, 1972, I communicated with the San Francisco Neighborhood Legal Assistance Foundation expressing my preliminary observations regarding the consistency of the above regulation with the Social Security Act and indicated that the Federal position in this area is under review. I understand that the California regulation is presently being litigated in the California State court and that the July 21, 1972 letter has been called to the attention of the court.

The California regulation has been reexamined in light of *Townsend v. Swank* and other judicial decisions concerning the validity of State eligibility requirements. In the opinion of HEW, exclusion of children whose parents live together but who themselves live elsewhere is not inconsistent with

the Federal standard governing continued absence. We see no reason, therefore, to change HEW's long standing policy of approval of EAS 41-450.12.

Yours very truly,

for PHILIP SCHAFER
Regional Commissioner
Region IX